

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

* * * * *

GARY SUOJA, Individually and as
Special Administrator for the Estate
of OSWALD F. SUOJA, Deceased,

Plaintiff,

vs.

Case No. 99-CV-475-BBC

OWENS-ILLINOIS, INC.,

Madison, Wisconsin

July 15, 2015

Defendant.

11:00 a.m.

* * * * *

STENOGRAPHIC TRANSCRIPT OF TELEPHONIC MOTION HEARING
HELD BEFORE MAGISTRATE JUDGE STEPHEN L. CROCKER

APPEARANCES:

For the Plaintiff:

Cascino Vaughan Law Offices, Ltd.

BY: ROBERT G. MCCOY

220 South Ashland Avenue

Chicago, Illinois 60607

For the Defendant:

Schiff Hardin, LLP

BY: BRIAN O'CONNOR WATSON

233 South Wacker Drive

Suite 6600

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CHERYL A. SEEMAN, RMR, CRR
Official Court Reporter
United States District Court
120 North Henry Street, Room 520
Madison, Wisconsin 53703
1-608-255-3821

1 (Called to order.)

2 THE COURT: Good morning. This is Magistrate
3 Judge Crocker. I understand I have the attorneys for the
4 parties in the Suoja case against Owens-Illinois. A
5 court reporter is here, which is why you're on speaker
6 phone. The case number is 99-CV-475-BBC. We're here for
7 a discovery dispute discussion and resolution. But first
8 let's find out who's appearing today. Who have we got on
9 behalf of the plaintiff today, please?

10 MR. MCCOY: This is Bob McCoy, Judge
11 (unintelligible).

12 THE COURT: All right. Mr. McCoy, good
13 afternoon -- or I'm sorry, good morning to you. And who
14 have we got on behalf of the defendant today?

15 MR. WATSON: Good morning, Your Honor. Brian
16 Watson representing Owens-Illinois.

17 THE COURT: All right. Mr. Watson, good morning
18 to you, also. Counsel, you two have done many calls with
19 me before on discovery disputes in other cases, so you
20 know the drill. Let me set the stage and give you the
21 Court's preliminary view and then I'll check in with each
22 of you. We have related motions going in both directions
23 here, so we'll just sort of round table this until the
24 Court has enough information.

25 But the first motion filed was on June 1. That's

1 Docket 84. That was the plaintiff's motion for
2 protection regarding certain emails, specifically a
3 December 18, 2014 email from Gary Suoja to Mr. McCoy, and
4 then a December 19, 2014 email from Mr. McCoy to
5 Mr. Cascino.

6 The response to that, Docket 85, came in on June 15.
7 It also had its own motion to compel that sort of
8 broadened the scope of the dispute between the parties as
9 to what discovery was still fair play in light of
10 Judge Crabb's April 10 order, which the judge docketed as
11 77. And I'll be referring back to that momentarily.

12 We then got the June 22 opposition on behalf of the
13 plaintiff to the motion to compel and we docketed that as
14 86.

15 Then 87, docketed on July 7, was defendant's letter
16 to the Court flagging these ongoing disputes and pointing
17 out that under Judge Crabb's revised schedule, July 10
18 was the deadline for any new summary judgment motions.
19 That letter is what flagged this for me. I was under the
20 mistaken impression that in light of Judge Crabb's April
21 10 order, these sorts of discovery disputes were in front
22 her, so I've got them now.

23 And I referred back to her order and to the issue
24 that's before the Court. And the bottom line is that the
25 privilege is waived here. The defendant has it right

1 that the Cascino Vaughn law firm cannot assert that it
2 did not have authority to settle this case on behalf of
3 the estate and withhold any information about that at
4 all. You can't use it as a sword and a shield.

5 Now, it's not clear to me from the plaintiff's
6 initial motion how much more they actually have in terms
7 of documentation. Certainly the Court's intent is to get
8 these two emails for ex parte, in camera review ASAP, as
9 in today or tomorrow, so that the Court can verify
10 whether these emails really are irrelevant, as plaintiffs
11 claim, or whether they actually fit within the waiver and
12 are relevant to Owens-Illinois, to the defendant.

13 As for the other discovery that's in dispute,
14 notwithstanding the bottom line, we have a practical and
15 a mechanical problem here, which is the timing. I
16 understand that there were or there was at least one
17 deposition -- I don't know if the other one has occurred
18 yet of the sister -- and I understand that Mr. McCoy
19 directed the witnesses not to answer a lot of questions.

20 I'm not sure that that's remediable at this point.
21 But to the extent that the defendant is asserting that it
22 has been prejudiced in its ability to support its pending
23 motion for summary judgment by the failure to obtain this
24 information, that's something that it can and should
25 specify in its reply in support of its motion to

1 Judge Crabb.

2 If there were more time here and if Judge Crabb had
3 not ordered that the deadlines are firm, I might have
4 more leeway and I would give you all some more time. But
5 I don't have the ability to countermand the judge's
6 order. And frankly, even if I were inclined to, there
7 really isn't time. She's made it clear that your
8 November 30 trial date is firm. She's also made it clear
9 she wants this motion under advisal by August 10.

10 So there's a couple of things I need to find out.
11 First, I need to find out from Mr. McCoy, are there any
12 other documents responsive to any of these discovery
13 requests that have been withheld beyond these two emails
14 that refer to the motion for protection and, if so, why
15 have they been withheld. And we'll talk about what needs
16 to happen next.

17 To Mr. Watson, then I just need him to give me some
18 input on my general concern about the failure to obtain
19 this other information at the depositions and what
20 Mr. Watson wants to see happen there. I'm not sure that
21 I can give Owens-Illinois much relief beyond that which
22 I've already stated. But I would have not gotten you all
23 on the phone if I wasn't prepared to accept some input,
24 some suggestions.

25 The last point is completely unrelated to this, but

1 I wanted to clear up with counsel whether this is a jury
2 trial or a bench trial. And the only reason I ask that
3 is that notwithstanding the fact that these are almost
4 always jury trials; in Judge Crabb's April 10 order,
5 Docket 77, she called it a court trial. But she also set
6 up motions in limine and response deadlines and set up a
7 final pretrial conference, none of which ordinarily occur
8 in bench trials. So I think it may have just been a
9 choice of the incorrect word, that this really is a jury
10 trial, but I at least wanted to take today as an
11 opportunity to clear that up.

12 So, Mr. McCoy, I'll start with you. Let's clear up
13 that last point first: is this a jury trial? And then if
14 you could answer my question about the documents, please.

15 MR. MCCOY: I don't know about the jury trial.
16 Normally I've handled the case with a jury, but this case
17 wasn't handled by me before. So my take --

18 THE COURT: Well, I don't mean to paint you in a
19 corner. When you say you don't know, if Mr. Watson is
20 okay with a bench trial, are you, or do you want a jury
21 here?

22 MR. MCCOY: I don't know that we need a jury
23 trial. I just haven't asked my client that question.
24 That's a good question. I just assumed we always take --
25 we always take the jury or it happens -- I haven't seen

1 one where it wasn't. But, I mean, I'll check with the
2 client about a bench trial, see if that's what he wants
3 to do.

4 THE COURT: Well, I'm not looking for trouble.
5 I'm just trying to clarify the parties' positions. And
6 what you're telling me is you just don't know?

7 MR. MCCOY: Right.

8 THE COURT: Okay. Well, then I'll ask for
9 Mr. Watson's input on that when it's his turn. But can
10 you then answer my question about documentation: are
11 there any other documents that have been withheld from
12 disclosure on the basis of privilege or relevance beyond
13 these two emails that you've specified?

14 MR. MCCOY: That bear on the settlement
15 agreement? No, there's none other ones that relate to
16 that settlement agreement. And, also, the reason why we
17 can't -- can't file any motion is because part of the
18 document relates to that settlement agreement and that
19 part should be disclosed and actually was disclosed on
20 one of those. The other parts of the document are other
21 matters involving trial strategy, other things that would
22 not be subject to waiver of the privilege.

23 THE COURT: Okay. Mr. McCoy, you offered in
24 your motion to provide these two documents to the Court
25 for ex parte, in camera review. Is that something that

1 can be done electronically either before close of
2 business today, July 15, or by noon tomorrow, July 16?

3 MR. MCCOY: Sure.

4 THE COURT: Okay.

5 MR. MCCOY: Sure. And the only reason you don't
6 have those now is because we contacted the clerk's
7 office. They said we can't file or provide documents
8 in camera. We have to first get a motion allowing us to
9 do that.

10 THE COURT: Well --

11 MR. MCCOY: That's been my intention the whole
12 time.

13 THE COURT: Understood. And like I said, part
14 of the problem here, in fact most of the problem here, is
15 a miscommunication within the court. So please get those
16 up to us for in camera submission. I'll enter a
17 text-only order as soon as we're off the phone here
18 confirming to the clerk's office that that's what the
19 Court wants. Mr. McCoy -- go ahead.

20 MR. MCCOY: How should I send those, Judge,
21 since they won't be filed?

22 THE COURT: Well, they do get filed, but they're
23 limited to the Court and to you. So I don't know if you
24 have a paralegal or some other assistant. But have the
25 people who actually do your filings contact the clerk's

1 office here in Madison and ask them for instructions on
2 how to make that happen, because it can be done, it is
3 frequently done, but we want to make sure that you guys
4 do it the right way to protect your information, okay?

5 MR. MCCOY: All right. And then the redacted
6 copy, I believe that was provided during the deposition
7 to Gary Suoja.

8 THE COURT: I think I've seen a copy of that in
9 the file, at least the one from Mr. Suoja to you. And
10 I'm assuming that the email you sent to Mr. Cascino on
11 December 19 is not otherwise available because you're
12 claiming privilege for the entire document, correct?

13 MR. MCCOY: Right. That document, we're
14 claiming privilege on that document, because that's not
15 the client's case.

16 THE COURT: Okay. Was there anything else you
17 wanted to --

18 MR. MCCOY: It also -- it also -- it also has
19 the same -- well, I'm sorry, Judge. I might have
20 misspoken on that. I think that the topic of the sealed
21 email, the same thing, which is part of it's privileged,
22 part of it's not. I would have to go back and look at
23 that.

24 THE COURT: Well, I'll need the whole thing
25 regardless. So rather than take time to look at it now,

1 send the Court an unredacted copy of that email along
2 with an unredacted copy of the December 18 email from
3 your client. And the Court then will be in a position to
4 determine what remains privileged, if anything, and for
5 which parts the privilege is waived pursuant to
6 Judge Crabb's previous order.

7 Mr. McCoy, the floor is still yours. Was there
8 anything else you wanted to tell or ask the Court about
9 these particular discovery disputes before I check in
10 with Mr. Watson?

11 MR. MCCOY: The only thing I would add, Judge,
12 which is what I said from the beginning, that is, in my
13 objections on privilege I was not objecting to questions
14 that involve the portions of this agreement. Those
15 questions I allowed the witness to answer. So the claims
16 about privilege were only made as to other matters. That
17 was the basis of those objections.

18 THE COURT: All right. Understood. Thank you.
19 Mr. Watson, to you then. Let's start with the
20 ministerial question about bench versus jury, if you've
21 got some input on that. And then I'll hear anything you
22 wanted to tell me about either the documents, the
23 depositions, or the procedure leading toward getting your
24 motion under advisal to the judge.

25 MR. WATSON: Your Honor, on the

1 jury demand/bench trial issue, Owens-Illinois has
2 been relying on plaintiff's jury demand, which it
3 included in their complaint at Document 2 on the docket.
4 And it's page 6 where plaintiff demands a jury trial of
5 six.

6 I would have to check with my client -- if plaintiff
7 is now withdrawing that jury demand and choosing to go
8 forward with a bench trial -- on whether we would agree
9 to a bench trial. But that's been our view of this case
10 so far, Your Honor.

11 THE COURT: Okay. So, Mr. Watson, would it be
12 fair and logical then for me to enter a text-only order
13 indicating that at this point it is a jury trial; but
14 that at any point, if both parties ask the judge for a
15 bench trial, we'll convert it, but keep the trial date;
16 how does that sound?

17 MR. WATSON: Correct.

18 THE COURT: Okay.

19 MR. WATSON: Sure.

20 THE COURT: I just wanted to clarify that. And
21 I want to make sure that both of you understand, I'm not
22 suggesting that it should be a bench trial. I'm not
23 trying to pressure anyone not to have a jury trial. I
24 was just trying to clarify what I saw as some uncertainty
25 in the record and that's been done. Mr. Watson, back to

1 you then, please.

2 MR. WATSON: The second topic that I would like
3 to cover is the issue of whether there are any additional
4 documents or documents being withheld on the basis
5 they're privileged. We don't have a log before us, so
6 the only documents that we know for certain about are the
7 two emails that are the subject of the protective order.

8 Owens-Illinois has seen the one redacted version of
9 the "Gary Suoja to Bob McCoy and Sue Merwin" email.
10 Owens-Illinois has not seen the Mike Cascino/Bob McCoy
11 email exchange. When Gary Suoja testified, and that's
12 document -- and we've submitted that under the Court's
13 document at Dock No. 93, Your Honor --

14 THE COURT: Right. I actually paged through
15 that. That came in on the 11th. It's the last entry on
16 our docket. It's very long, so I won't pretend I've read
17 it all, but I got a flavor of it.

18 MR. WATSON: Okay. The significant issues that
19 we encountered with regard to not having documents in
20 advance of the deposition were not only these two emails
21 that we've talked about so far; but additionally, in our
22 request for production we had asked for "All documents
23 that constituted your agreement with CVLO to engage or
24 retain them as your attorney." And that's Document
25 Request No. 1 and 2. No documents were produced in

1 response to those requests for production.

2 And Gary Suoja testified that it was his
3 understanding that the estate engaged Cascino Vaughn Law
4 Offices in the state court proceeding with a retention
5 agreement and he's been operating under that
6 understanding all along.

7 That leaves the open question here, Your Honor, with
8 regards to discovery is, is there an agreement between
9 Cascino Vaughn Law Offices and with the estate of Oswald
10 Suoja. We don't have an answer to that question.

11 Our presumption, having seen past litigation with
12 Cascino Vaughn Law Offices, is that it's their practice
13 to obtain retention agreements with their clients. And I
14 would expect that's a good practice to have. Part of
15 that retention agreement, we would expect, deals with
16 settlement authority. And I am concerned about
17 Mr. McCoy's representation today that there are no other
18 documents.

19 THE COURT: I'm sorry, Mr. Watson. Let me
20 interrupt there. Mr. McCoy, do you know, yes or no, is
21 there a retainer agreement here, some sort of a written
22 agreement regarding representation between your law firm
23 and either the deceased or the estate or Mr. Suoja?

24 MR. MCCOY: Yes, there is a retainer agreement,
25 Judge. That --

1 THE COURT: All right.

2 MR. MCCOY: -- I don't know is relevant in light
3 of the ruling by the judge that these motions concern.

4 THE COURT: Well, I'm ruling that it is relevant
5 and it's discoverable, so you'll have to turn it over,
6 because if there is anything in there about the authority
7 to settle, that's -- that could be critical here. That
8 would be a smoking gun either for you or against you. So
9 that cannot be withheld, understood?

10 MR. MCCOY: Okay.

11 THE COURT: Mr. Watson, back to you.

12 MR. MCCOY: I'll provide -- I'll provide -- I'll
13 provide the retainer agreement, Judge. This is being
14 provided though, Judge, for a limited purpose here.

15 THE COURT: Well, I understand your view that
16 it's not relevant, but that's not really the issue today.
17 It is discoverable in light of the claim made by the
18 plaintiff's team that there was no authority to settle
19 this case in the first instance. And Mr. Watson is
20 entitled to look at your document, your retainer
21 agreement, and see if he thinks it gives him anything to
22 work with here, so --

23 MR. MCCOY: All I'm asking -- all I'm asking,
24 Judge, is that the production is accompanied by an order
25 that it's only for the purposes of this enforcement of

1 the settlement, but not to be generally disclosed as a
2 document produced in litigation to the public.

3 THE COURT: Well, it can and will fall under the
4 protective order. I assume we've got one in this case.
5 If not, I'm ordering it protected from general disclosure
6 because I'm sure it does contain confidential business
7 information and that's really none of the public's
8 business. Mr. Watson, do you object to that?

9 MR. WATSON: I don't object to that, Your Honor.

10 THE COURT: Okay. So, Mr. McCoy, yes, you're
11 entitled to have it filed under seal or used under seal
12 by the parties here. I don't recall if you've got a
13 protective order in this case in this court. If you do,
14 it covers this retainer agreement. If not, by order
15 during this phone call, we'll protect it. Mr. Watson.

16 MR. WATSON: Your Honor, we don't --

17 THE COURT: Go ahead.

18 MR. WATSON: -- we don't have a protective order
19 in this case. And the only issue that I foresee is if it
20 comes to dispositive motion practice or, at a trial,
21 either bench or jury, at that point it becomes a more
22 significant issue about first amendment issues and
23 disclosure to the public or whether the court needs to be
24 sealed at any moment, but I guess we will cross that
25 threshold when we get there. I just wanted to make sure

1 the Court knew there isn't an existing protective order.

2 THE COURT: Understood. And, Mr. Watson, of
3 course you're right, under *Seattle Times v. Rhinehart* and
4 all the Seventh Circuit cases, if the Court were to rely
5 on confidential information in making a ruling or if the
6 parties were to offer it in a public trial, then it has
7 to be made public or at least parts of it have to be made
8 public. But you're also correct that that's looking for
9 trouble.

10 It can be filed -- if you're going to use it in
11 reply in support of your motion, you may file it under
12 seal. That's routine here. If the judge then relies on
13 it and cites to it, it will be up to her to determine how
14 to disclose it. But for now it will be protected. Back
15 to you, Mr. Watson.

16 MR. WATSON: Thank you, Your Honor. And just to
17 tie the Court back to what's on the record so far, when I
18 was talking about Mr. Suoja's testimony, that's at pages
19 92 through 94 of his deposition. And I just wanted to
20 make sure that at least the Court's record is clear on
21 both my representation of his testimony and on his
22 understanding of the request for production versus
23 Mr. Suoja's testimony.

24 THE COURT: Duly noted.

25 MR. WATSON: The second issue was at pages 146

1 of Mr. Suoja's testimony. Mr. Suoja testified that there
2 has been additional email communications with the Cascino
3 Vaughan Law Offices regarding settlement with
4 Owens-Illinois additional to the "Gary Suoja to Bob McCoy
5 and Sue Merwin" email and additional to the
6 Mike Cascino/Bob McCoy email. And that would be
7 requested in our request for production for all documents
8 that refer or relate to communications regarding the
9 proposed settlement, which is Document Request No. 3,
10 Your Honor.

11 THE COURT: Okay. Let's ping-pong back to
12 Mr. McCoy. Mr. McCoy, apparently this deposition
13 occurred on June 26th. In light of Mr. Gary Suoja's
14 testimony that there were other emails, did you or anyone
15 else actually go back to find those or ascertain whether
16 he was correct about that?

17 MR. MCCOY: Which page are we referring to?

18 THE COURT: 146.

19 MR. WATSON: Through 149, Your Honor.

20 THE COURT: Understood.

21 MR. MCCOY: One moment. There's no doubt I have
22 a lot of emails with Gary Suoja.

23 THE COURT: Well, Mr. McCoy, let's do it this
24 way --

25 MR. MCCOY: I -- I -- I'm -- I'm happy to turn

1 over emails that came afterwards to the Court for
2 in camera review, but I didn't know --

3 THE COURT: Well, let's start there and let's be
4 clear or as clear as we can be today about what plaintiff
5 and you, plaintiff's law firm, have to do and how
6 quickly.

7 I see in the deposition pages to which we are now
8 referring, 146 to 149, that at the time you were claiming
9 privilege. Under the circumstances here where the
10 privilege has been waived, at least in part, and where
11 there may be some dispute as to where the appropriate
12 line between waiver and continued privilege may fall,
13 what I want you to do, either directly or through trusted
14 and reliable assistance, is to get the Court in camera
15 all of those communications.

16 And I want those by noon tomorrow. I'd give you the
17 longer deadline, but we've got to get these in front of
18 the Court so that we can look at those and determine, do
19 they fit within the waiver that Judge Crabb has found or
20 not. I won't make you give them directly to Mr. Watson
21 unless, on review at this point, you realize that the
22 claim of privilege does not apply to a particular
23 communication.

24 But they all have to go over. And when I say "all,"
25 I'm talking about any communications before this issue

1 came to a head in this court that may relate to the scope
2 of the representation and the authority to settle. There
3 may not be anything in there, but somebody has got to
4 look and they've got to look now.

5 What were the communications between Gary Suoja and
6 your law firm, either in email or otherwise, about
7 authority to settle, the adequacy of the settlement
8 offer, and then the explosion afterwards or the implosion
9 of the alleged agreement or purported agreement and what
10 Mr. Suoja had to say about that; it's all got to come
11 over to the Court in camera, ex parte, by noon tomorrow,
12 understood?

13 MR. MCCOY: Right. We'll get them in, yes. The
14 communications that I remember --

15 THE COURT: Well, I'm not asking you to remember
16 off the top of your head. That's not fair to you. I
17 want somebody to go through and check the correspondence
18 file and get us that by noon tomorrow, understood?

19 MR. MCCOY: I will, I will, but I just want to
20 make clear our conversation. There definitely was
21 communications about the motion to enforce the agreement,
22 which --

23 THE COURT: Those have to come in. Those have
24 to come into the court. If they are privileged, they
25 will not be disclosed. But the Court has to have the

1 opportunity to look at those.

2 MR. MCCOY: Okay. I'll provide those.

3 THE COURT: Thank you. Mr. Watson, we're still
4 on your dime. What else have you got?

5 MR. WATSON: Your Honor, at page 176 of
6 Mr. Suoja's testimony he's asked whether he has
7 information on -- his attorney is actually representing
8 to Owens-Illinois prior to December 18th. And his answer
9 is: "I wasn't part of the negotiations, so I don't
10 know."

11 And the concern we have here, Your Honor, is the
12 back and forth between the estate and Owens-Illinois
13 reaches far beyond Mr. Suoja's personal knowledge. And
14 as we lay out in our papers, it's our belief that it's
15 Mr. Suoja's obligation, as he's purporting to act as
16 special administrator, to check not only his personal
17 knowledge, but the knowledge of the estate and whether
18 there are any communications relating to settlement or
19 authority to settle of the estate, which may reach back
20 before Mr. Suoja's personal knowledge, and there was
21 nothing produced to Owens-Illinois on whether there are
22 previous representations by the estate to Owens-Illinois
23 regarding the authority to settle.

24 THE COURT: Okay. Let me make sure I understand
25 the distinction you're making and then I'm going to pose

1 a question about implementation, or actually I'll pose
2 the question about implementation first and then see if
3 that comports with what I think you're saying.

4 Regardless of when Mr. Gary Suoja put himself forth
5 as the representative of the estate, would it not be true
6 that the Cascino Vaughn Law Offices would have copies of
7 all the communications with any other representatives?
8 In other words, because of the depth in time of the order
9 I've just given to Mr. McCoy, would the firm be providing
10 all of this so that we don't have to rely on Mr. Suoja to
11 go back and check things or am I just saying the same
12 thing you did in a different way?

13 MR. WATSON: You're saying the same thing -- you
14 did it in a different way, Your Honor -- in that there is
15 obviously a great deal of time going back to 1996 which
16 reaches beyond Mr. Suoja's personal knowledge. And based
17 on Mr. Suoja's responses in discovery and his responses
18 during his deposition, Owens-Illinois' concern is whether
19 Mr. Suoja has met his obligation to probe whether there
20 are additional communications preceding his time going
21 back to 1996 which may bear on the issue of settlement
22 and authority to settle.

23 THE COURT: Well, and that's why I was not sure
24 what you were talking about. For discovery purposes,
25 what you're looking for is those communications. Whether

1 Mr. Suoja is being true to those representations and
2 agreements is a different issue, correct?

3 MR. WATSON: It is a different issue in so far
4 as his discovery responses made clear that he's only
5 answering personally.

6 THE COURT: Right. No, I get that and that was
7 part of your motion. But, Mr. McCoy, let's be even more
8 clearer. And I think you get this, but I want this to be
9 of record. Have your assistant, have your paralegal,
10 have an associate, go back and look through the Suoja
11 file all the way back for any communications between the
12 firm and the estate, regardless who the representative
13 was, as to settlement authority, retainer agreements,
14 anything. It's not just Gary Suoja; it's anyone who
15 represented the estate, because the estate is an entity
16 apart from its representative. And it's not fair to
17 Owens-Illinois and it's not responsive to the Court's
18 order for Gary Suoja just to talk about what he knows
19 personally as to opposed to what the estate as an entity
20 knows constructively. Mr. McCoy, do you understand what
21 I'm directing?

22 MR. MCCOY: Right. If there is something in the
23 past that said --

24 THE COURT: All the way back.

25 MR. MCCOY: -- the estate has given my firm

1 authority to enter into a settlement.

2 THE COURT: Anything related to that. And that
3 probably starts with the retainer agreement, maybe not.
4 But if there's anything subsequent to that, that's all
5 fair game. And I think that ought to be clear enough
6 from our previous conversation today, but Mr. Watson
7 wants to flag that. I think he's entitled to make sure
8 it's pellucid and now I think it is. Mr. Watson, back to
9 you.

10 MR. WATSON: Your Honor, on Request for
11 Production No. 10, Owens-Illinois --

12 MR. MCCOY: Judge --

13 THE COURT: Yeah. Can you give us a cite?

14 MR. MCCOY: -- the matter we just talked about
15 or submitted for in camera review, there are such
16 communications before --

17 THE COURT: Yes. Well, Mr. McCoy, let's stick
18 with this understanding: presumptively you may and should
19 file everything in camera for ex parte review. But to
20 the extent that it is clear, from even a cursory review
21 of any particular document, that it is discoverable, go
22 ahead and turn it over, but also give it to the Court so
23 that we've got a complete set.

24 If it's quicker just to give everything to the
25 Court, I think that's important, because as I noted at

1 the outset, time is of the essence here. And the sooner
2 we get these documents now, the sooner the Court can
3 actually review them.

4 Today is Wednesday. If we've got them by tomorrow,
5 hopefully barring unexpected events in the court -- and
6 I'll be honest with you, we get them a lot here -- we
7 could probably get you both a ruling by Friday on these
8 documents and that's what I'm aiming toward. Okay. So,
9 Mr. McCoy, yes, ex parte, in camera, but quickly and
10 thoroughly, understood?

11 MR. MCCOY: Right. The only thing I can say is
12 you're talking about documents from the 1990s. I know I
13 got the retainer agreement. I saw that. This is all
14 before I was working on this case. But documents in the
15 1990s, I'm not sure how fast our firm can find those. I
16 mean, I'll certainly do our best. I think they can be
17 found very quickly.

18 THE COURT: Well, sure. And, Mr. McCoy --

19 MR. MCCOY: I would let you know. I think we
20 can get them.

21 THE COURT: Okay. Again, to invoke one of
22 our -- we aren't going to look for trouble now. Make it
23 a top priority. If your people run into snags or
24 slowdowns or roadblocks, let Mr. Watson know, let the
25 Court know. We will be fair. We will be realistic. But

1 we won't anticipate roadblocks, snags or delays at this
2 point. We will expect that it's all accessible and able
3 to be filed with the Court by noon tomorrow absent some
4 kindly word from you or your people that that's just not
5 possible and why not, okay?

6 MR. MCCOY: Right.

7 THE COURT: Mr. Watson, back to you.

8 MR. MCCOY: One other comment I have, Judge, is
9 I didn't understand Gary Suoja's answers to only be his
10 personal knowledge. I understood him to be speaking for
11 everything he knew about the estate and haven't been --

12 THE COURT: Right. But, Mr. McCoy, I get that.
13 I get that. But that's not the -- that's not the measure
14 of discoverable information. And as we all know, under
15 Seventh Circuit law, an entity, whether it's an estate or
16 a corporation or a partnership, has existence apart from
17 the flesh and blood representatives.

18 So to the extent that the estate here may have other
19 documents that Mr. Suoja just didn't recall, Mr. Watson
20 is entitled to see those. And that's what you and your
21 people are looking for just so that we have a thorough
22 disclosure of anything that's relevant here.

23 MR. MCCOY: I understand. Those will be
24 produced.

25 THE COURT: Good. Mr. Watson back to you then.

1 MR. WATSON: Your Honor, on Request for
2 Production No. 10, Owens-Illinois asked for all documents
3 related to the dissolution of the estate. And as we lay
4 out in our motion to compel, the reason for requesting
5 that discovery is they may show that the claims are not
6 viable based on the prior state court action and then
7 closing of the estate or the reason for the dissolution
8 of the estate. And it will bear on the relationships
9 between Cascino Vaughn Law Offices, the estate, the
10 deceased, other heirs or any information that we can at
11 least obtain to determine what that relationship is and
12 why the estate was closed.

13 And the Response to Request for Production No. 10
14 was: "Objection. Not relevant to any claim or defense."
15 We think those documents should be produced.

16 THE COURT: Okay. Mr. McCoy, let's start with
17 the practical concern and then expand into the more
18 substantive or legal concern. Do you or, to your
19 knowledge, does Mr. Gary Suoja have access to the
20 documents that were generated in dissolving this
21 particular estate?

22 MR. MCCOY: My firm got the file from the court.

23 THE COURT: The state court?

24 MR. MCCOY: That's all we have.

25 THE COURT: Okay.

1 MR. MCCOY: And we turned that over to
2 Owens-Illinois.

3 THE COURT: So they already have that?

4 MR. WATSON: That's just not true, Your Honor.

5 THE COURT: Okay.

6 MR. MCCOY: Well, my firm got the file from the
7 court, the probate court, and turned it over to
8 Owens-Illinois.

9 MR. WATSON: That's just not accurate, Your
10 Honor.

11 THE COURT: Okay. Well, Mr. Watson --
12 Mr. Watson, I can't resolve that dispute between you and
13 Mr. McCoy over the telephone. But, Mr. McCoy, go back
14 and double-check. If you've got the probate file --

15 MR. MCCOY: I will give it to them again.

16 THE COURT: First time, second time, it goes
17 over ASAP, okay?

18 MR. MCCOY: I will provide it, those documents,
19 in camera.

20 THE COURT: Good. Mr. Watson, back to you.

21 MR. WATSON: Your Honor, on a related topic, and
22 I'm not sure whether the Court can resolve it, if it's
23 something that just needs to be flagged at this point,
24 but on Request for Production Nos. 4 through 7 we
25 received limited production of the documents from the

1 state court proceeding.

2 THE COURT: Are we talking about the probate or
3 something else?

4 MR. WATSON: Sorry, Your Honor. That's my fault
5 in transitioning here. We're talking about something
6 else. Delores Suoja had a previously-filed state court
7 case in Wisconsin. Owens-Illinois was not a party to
8 that case. That case was resolved on a dismissal on the
9 merits and -- two years after it was filed. And it
10 proceeded all the way through facts and expert discovery.
11 There were depositions taken. There were court hearings.
12 There was written discovery exchanged between the
13 parties. Numerous defendants ended up moving for summary
14 judgment, according to what we can see from the court's
15 online dockets.

16 THE COURT: What county was it in, do you know?

17 MR. WATSON: Dane County, Your Honor.

18 THE COURT: Okay.

19 MR. WATSON: We received some documents from
20 that estate court tort action in Dane County. It wasn't
21 a complete production by any measure. It didn't include
22 any depositions. It did not include the discovery
23 responses that were exchanged except for those that were
24 attached to I think one motion for summary judgment,
25 maybe two motions for summary judgement.

1 THE COURT: Now, did Cascino Vaughn represent
2 Delores Suoja in that state court proceeding?

3 MR. WATSON: It did, Your Honor.

4 THE COURT: Okay. Keep going.

5 MR. WATSON: So our concern at this moment is
6 two-fold. First is whether it's a complete production.
7 The second is if it's not a complete production,
8 verification that that is all the documents that were
9 preserved, because if there were not documents preserved
10 during the course of litigation, we would have
11 significant concerns that we will likely raise at a
12 pretrial stage or a motion in limine stage with regard to
13 preservation of evidence.

14 THE COURT: Okay. So, Mr. McCoy, let's turn to
15 you on that one. Do you know, and can you aver today
16 during this hearing, whether everything your firm has
17 from that state court case has been turned over or is
18 that something where your people will have to go back and
19 double-check?

20 MR. MCCOY: It has been turned over, Judge --

21 THE COURT: Okay.

22 MR. MCCOY: -- whatever we had. Now, let me
23 explain. Our firm can't find in the files from that
24 earlier case --

25 THE COURT: I think that's all Mr. Watson is

1 asking. And you're now of record saying you looked,
2 everything you've got you turned over, there's no place
3 else to look, there's nothing else to turn over; is that
4 what you are telling us today?

5 MR. MCCOY: Yes. And just to explain further,
6 you know, our firm went and pulled the file in Dane
7 County, the state court files, and we provided copies of
8 those files to the defendant --

9 THE COURT: Right. Well, and I'm sure
10 Mr. Watson --

11 MR. MCCOY: -- along with all the discovery

12 THE COURT: -- I'm sure Mr. Watson has sent his
13 people up to look at Dane County as well. What he's
14 looking for is Cascino Vaughn Law Office files. And what
15 you've just told us both is that your people have checked
16 internally and there's nothing else to turn over. And I
17 don't want to put words in your mouth, but that's what
18 you're telling us today, correct?

19 MR. MCCOY: That's right. Yes.

20 THE COURT: Okay. Mr. Watson, does that answer
21 that one for today's purposes?

22 MR. WATSON: For today's purpose it does, Your
23 Honor.

24 THE COURT: Mr. Watson, the microphone is still
25 yours.

1 MR. WATSON: Your Honor, that is all with regard
2 to the motion to compel the written discovery. The
3 flipside of that, Your Honor, is, as you raised earlier,
4 the procedural problem of depositions and not having
5 complete written discovery while you're taking
6 depositions. And without seeing what additional written
7 discovery exists, Owens-Illinois wasn't fully able to
8 examine Mr. Suoja and postponed the deposition of Sue
9 Merwin and did not take and chose to defer any
10 depositions of counsel in this case.

11 I think we're still in that position, not having
12 seen the documents. We haven't changed anything from
13 where we were two weeks ago or a week ago. We just now
14 know that we can expect to see some additional material.

15 THE COURT: Well, Mr. Watson, I understand and I
16 started this hearing by acknowledging that that is truly
17 a concern. It's a legitimate concern. But in light of
18 what Judge Crabb has said about the calendar, I'm going
19 to have to stick with what I told you at the outset.

20 To the extent that you wish to argue to Judge Crabb
21 that this failure to timely provide the information and
22 your failure -- your inability to be able to ask and
23 obtain answers to certain questions because documents
24 were not produced, or otherwise, you've got to put that
25 in your reply to the judge and ask for one of two things:

1 Either ask that you win your motion either on a factual,
2 legal or equitable basis or implore the Court to give you
3 more time to follow up on this and move back the trial
4 date. Other than that, that's above my pay grade.

5 I'm not going to reopen the depositions. There's
6 really not -- and I'm not going to expand the calendar
7 that Judge Crabb personally set. So I think that's the
8 best you're going to get out of the Court today with a
9 full acknowledgement that you have some legitimate
10 concerns, understood?

11 MR. WATSON: Discovery is considered then closed
12 entirely as of July 10, 2015, according to the Court's
13 order that's 77?

14 THE COURT: Yes, other than what I am ordering
15 the Cascino Vaughn law firm to provide to you. We're not
16 going to redo depositions at this point, okay? So to the
17 extent that prejudices you, you can make your arguments
18 in reply.

19 MR. WATSON: Understood. The secondary point to
20 that, Your Honor, is plaintiff hasn't moved for summary
21 judgment on any issues either. So to the extent there is
22 discovery that could be taken between now and live issues
23 at trial, Owens-Illinois will implore Judge Crabb with
24 any arguments to try and obtain that discovery.

25 THE COURT: Understood, because the way I read

1 her order, which was perhaps focused more on the issue
2 directly in front of her instead of the big picture, was
3 that she set a July 10th discovery cutoff, period, and
4 she didn't make that specific to the retainer agreement
5 or the ability-to-settle issue. I think *implore* is the
6 right verb. *Petition, plead, cajole*, you pick your verb,
7 but it's up to the presiding judge to give you relief.

8 Mr. Watson, anything else today then?

9 MR. WATSON: Nothing further, Your Honor.

10 THE COURT: Okay. Mr. McCoy, any questions --
11 I'll tell you what, Mr. McCoy: because we kept adding to
12 your to-do list as we went, I'll give you until
13 constructive close of business tomorrow, which is 4:30 in
14 the afternoon, to get this all into the court. As we all
15 know, you could file electronically 24-7. But so that
16 Mr. Watson and his people have a chance to look at this
17 stuff before they have dinner; instead of noon tomorrow,
18 everything you've got that's responsive to this court's
19 order to you has to be in by 4:30 tomorrow afternoon,
20 understood?

21 MR. MCCOY: For in camera?

22 THE COURT: Right, in camera. I'm sorry. I
23 misspoke. Of course it's going to be in camera.
24 He's not going to see it, but I will, and I'll look at it
25 before dinner tomorrow and get everybody the best ruling

1 I can by Friday. I stand corrected. I apologize for
2 that. But you're right, Mr. McCoy, in camera.

3 Mr. McCoy, anything else today then?

4 MR. MCCOY: No. I don't have anything else
5 today to add, Judge.

6 THE COURT: Okay. Well, then I'll enter a
7 text-only order commemorating where we landed. And I
8 think it's clear enough what needs to happen and how
9 quickly it needs to happen and then we'll take it from
10 there. Thank you both. We're done for today.

11 (Adjourned at 11:54 a.m.)

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1 I, CHERYL A. SEEMAN, Certified Realtime and
2 Merit Reporter, in and for the State of Wisconsin,
3 certify that the foregoing is a true and accurate record
4 of the proceedings held on the 15th day of July, 2015,
5 before Magistrate Judge Stephen L. Crocker, of the
6 Western District of Wisconsin, in my presence and reduced
7 to writing in accordance with my stenographic notes made
8 at said time and place.

9 Dated this 23rd day of July, 2015.

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14
15 /s/

16 Cheryl A. Seeman, RMR, CRR
17 Federal Court Reporter
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